

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF AGRICULTURE

In the Matter of the Suspension of Permit to Sell Grade A Milk and the Denial of Certification to Sell Manufacturing Grade Milk for Roger Zavoral, Route 2, Hutchinson, Minnesota 55350	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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The above-entitled matter came on for hearing before Administrative Law Judge Marlene E. Senechal on May 3, 1990, commencing at 1:00 p.m. in Conference Room B of the Minnesota Department of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota. The record closed upon conclusion of the hearing.

Paul A. Strandberg, Special Assistant Attorney General, 520 Lafayette Road, Suite 200, St. Paul, Minnesota 55155, appeared representing the Minnesota Department of Agriculture (Department). Terrence E. Conkel, Gavin Olson Conkel & Savre Ltd., 1017 Hennepin Avenue, Glencoe, Minnesota 55336, appeared representing Roger Zavoral.

This report is a recommendation, not a final decision. The Commissioner of Agriculture will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions and Recommendation contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Questions regarding the procedures to be followed for filing exceptions and presenting argument should be directed to Jim Nichols, Commissioner of Agriculture, 90 West Plato Boulevard, St. Paul, Minnesota 55106.

STATEMENT OF ISSUE

The issue to be determined in this case is whether the suspension of permit to sell Grade A milk and the denial of certification to sell manufacturing grade milk for Roger Zavoral should be affirmed.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Department is the state agency responsible for the permitting, certification and inspection of dairy farms in the State of Minnesota. A person must hold a permit from the Department before that person may sell Grade A milk and a person must obtain certification from the Department before that person may sell manufacturing grade milk. The Department must inspect dairy farms every six months in regard to Grade A milk permits and annually in regard to manufacturing grade milk certification. To ensure that the Department observes the normal operations of the dairy farms, the Department does not provide advance notice of the inspections to the dairy farm operators.

2. Inspections of the state's 16,000 dairy farms are conducted by 24 inspectors of the Department's Dairy Industries Division. Inspectors are assigned geographically throughout the state. Inspections include examination of the dairy farm's milk house and equipment, the milk cows, and the fountains and wells on the farm.

3. Roger Zavoral owns a 200 acre farm near Hutchinson, Minnesota, in McLeod County. He acquired the farm from his father in approximately 1978. He has been working on the farm since his graduation from high school, either for his father or, more recently, for himself. He resides on the farm with his wife, their children and his father. He is presently milking 36 cows.

4. On March 20, 1984, Jennifer Holt and Gil Ebner, Department inspectors, and Greg Pittman, their supervisor, made a routine inspection of Mr. Zavoral's dairy farm. During the course of the inspection, Mr. Zavoral complained about the failure of the Department employees to sanitize their footwear before entering the milk house. After completion of the inspection, Mr. Zavoral also made comments to the Department employees, which they interpreted as threats, regarding the use of firearms, stating words to the effect of "I should get a gun and shoot your tires out", and "when I start shooting I don't care what or who it is at.,,

5. Following this incident, a letter dated May 10, 1984, was sent by Bruce A. Marzolf, Assistant Director of the Dairy Industries Division of the Department, to Mr. Zavoral. The letter stated that the Department would comply with Mr. Zavoral's request that footwear be sanitized and advised that verbal or physical abuse of Department inspectors would not be tolerated. AG Ex. 1.

6. On August 26, 1985, Donald Goldsmith, Department inspector, made a routine inspection of Mr. Zavoral's dairy farm. The inspection score was 73. (A passing score is

90.) This was Mr. Goldsmith's first inspection of the Zavoral farm.

7. Following the August 26, 1985, inspection, Mr. Goldsmith's supervisor, Mr. Pittman, advised Mr. Goldsmith that he should not make the follow-up inspection alone because of prior problems with Mr. Zavoral. On September 4, 1985, Mr. Goldsmith, accompanied by Mr. Pittman, made a reinspection of Mr. Zavoral's farm. During the reinspection Mr. Zavoral complained about Mr. Goldsmith's clothing, the way he parked his car and other items. Mr. Zavoral accused Mr. Goldsmith of not being fair and he argued about the various deficiencies found during the prior inspection.

8. Following this incident, by letter dated September 18, 1985, from Mr. Pittman, Mr. Zavoral was advised that the Department expected him to treat Department inspectors with respect. AG Ex. 2.

9. In December of 1985, Michael Krim, Assistant Director of the Department's Dairy Industries Division, was informed by Harry Dehn, field representative of Mid-America Dairy (the owner of the milk plant to which Mr. Zavoral was then selling his milk), that Mr. Zavoral did not want Mr. Goldsmith to be the inspector for his farm and that Mr. Zavoral intended to keep his milk house locked. Mr. Dehn suggested that a meeting be held prior to the next Department inspection in an attempt to resolve any problems.

10. On February 25, 1986, Mr. Krim, Mr. Pittman, Mr. Goldsmith, Mr. Dehn, Mr. Zavoral and others met at the Mid-America plant. They discussed Mr. Zavoral's objection to Mr. Goldsmith's beard, Mr. Zavoral's request that Mr. Goldsmith not inspect the farm, and Mr. Zavoral's plan to lock the milk house. Following the meeting, the Department agreed to inspect Mr. Zavoral's farm prior to 11:30 a.m. and Mr. Zavoral agreed not to lock the milk house prior to that time.

11. On August 20, 1986, Mr. Goldsmith and Mr. Pittman went to Mr. Zavoral's farm to conduct a routine inspection. When they arrived at the farm, Mr. Zavoral's pick-up was blocking the driveway. Since it was raining at the time, they decided to drive around the pick-up instead of walking to the barn. In doing so, they drove across a portion of the lawn. When they parked by the barn, Mr. Zavoral began shouting at them about driving across the lawn. He grabbed Mr. Goldsmith's arm and shoulder and tried to pull him out of the car. Mr. Goldsmith was afraid and hung onto the steering wheel. Mr. Pittman said that they were leaving. Mr. Zavoral then attempted to grab the car keys from Mr. Goldsmith. After a two or three minute confrontation, Mr. Goldsmith was able to extricate himself and start the car. As they drove off, Mr. Zavoral hit or kicked the car.

12. By letter dated September 3, 1986, from Mr. Krim, Mr. Zavoral was advised that his Grade A permit was suspended on August 20, 1986, due to his "assault upon the Minnesota Department of Agriculture inspector during an attempt to inspect your farm and also your previous threats and actions towards our inspectors in 1984, 1985 and earlier this year which interfered with required inspections." Mr. Zavoral was advised that the Department required written assurance that no further harassment, threats or interference would occur before the Department would inspect his farm. He was also advised that his Grade A milk permit would remain suspended and that his manufacturing grade milk certification would lapse September 22, 1986. He was further advised that he had a right to a hearing to contest the suspension and proposed revocation of his permits. AG Ex. 3.

13. Prior to September 22, 1986, Mr. Zavoral signed an agreement which provided as follows:

I understand that my Grade A permit was suspended on Wednesday, August 20, 1986 due to my physical interference with the Minnesota Department of Agriculture inspector, which prevented accessibility of such inspection and also due to my previous actions which have impeded the required inspections.

This letter will serve as my written assurance that no further harassment, threatening, or other interference with regularly scheduled inspections will incur (sic.) In particular, I agree:

1. That I will keep my milk house unlocked until 11:30 a.m.
2. That I will not block the driveway in such a way as to prevent access to the milk house.
3. That I will totally refrain from verbal harassment of any sort such as comments regarding the inspector's appearance, reference to guns, threats of actions against the person or possessions of the inspector or the Department.
4. That I will not physically touch or make threatening gestures toward the inspector, the inspector's vehicle, or any of the inspectors (sic) or the State's property.

Further, I agree that any future actions by me, which the Department considers interference with the inspection, will result in an immediate revocation of my authority to sell either Manufacturing Grade or Grade A milk

AG Ex. 5.

14. In a letter forwarding the above agreement to the Department, counsel for Mr. Zavoral requested that an inspector other than Mr. Goldsmith be assigned to Mr. Zavoral's farm, arguing that the problems which gave rise to the agreement related to a personality conflict between Mr. Zavoral and Mr. Goldsmith. Id.

15. Following the agreement, Mr. Goldsmith and Mr. Pittman inspected Mr. Zavoral's farm on September 23, 1986, and Mr. Zavoral's Grade A permit was again issued.

16. By letter dated September 24, 1986, from counsel for the Department to counsel for Mr. Zavoral, the Department agreed that its inspectors would not drive on Mr. Zavoral's lawn unless their access to the area where the milk truck parked outside the milkhouse was obstructed. AG Ex. 6.

17. Following the September 1986 agreement, Mr. Goldsmith was advised by his supervisors that all future inspections of Mr. Zavoral's farm should be made in the company of another person. During subsequent inspections, therefore, Mr. Goldsmith arranged to meet a representative of the milk plant to which Mr. Zavoral sold his milk (field representative) at Mr. Zavoral's farm on the dates of the inspections.

18. In October of 1989, following Mr. Goldsmith's inspection of two farms near Mr. Zavoral's, the operators of those farms complained that it was unfair that Mr. Zavoral always had prior notification of Mr. Goldsmith's inspections. Mr. Goldsmith suspected that Mr. Zavoral's field representative may have been giving Mr. Zavoral prior notification of the inspections. Mr. Goldsmith confirmed with his supervisors that the September 1986 agreement with Mr. Zavoral did not require the presence of a field representative during inspections. In March of 1990, he informed Delbert (Del) Blackwell, Mr. Zavoral's field representative, that Mr. Blackwell need not accompany him on future inspections. He also asked Mr. Blackwell to inform Mr. Zavoral of this change. Mr. Blackwell did not advise Mr. Zavoral of this change.

19. On April 12, 1990, at approximately 9:30 a.m., Mr. Goldsmith and Mr. Pittman went to Mr. Zavoral's farm to conduct a routine inspection. After parking the car in the driveway near the garage, Mr. Goldsmith got out of the car. Mr. Zavoral's wife, Elizabeth (Betty) Zavoral, came out of the house. She asked Mr. Goldsmith where the field representative was and told Mr. Goldsmith that he could not conduct the inspection without the representative present. Mr. Goldsmith explained that the September 1986 agreement did not require the presence of the representative.

Mrs. Zavoral then called to her husband. Mr. Zavoral came out of the house and asked Mr. Goldsmith the same question regarding the field representative. Mr. Goldsmith again explained that the agreement did not require the presence of the representative and that he would wait while Mr. Zavoral looked at the agreement or called his attorney. Mr. Zavoral then observed Mr. Pittman in the car and said words to the effect of "who the hell is that?" and came towards the passenger side of the car. Mr. Pittman locked his car door because he was afraid that Mr. Zavoral would "lay into him.,, Mr. Zavoral then said words to the effect of "it's chicken shit Pittman." Mr. Pittman then got out of the car and began talking to Mr. Zavoral. Mr. Zavoral then asked Mr. Goldsmith and Mr. Pittman for their identification. 1/ Before the identification was produced, Mr. Zavoral told them that Mr. Goldsmith could conduct the inspection but that Mr. Pittman could not. Mr. Pittman said that both of them would conduct the inspection. About this time Mr. Zavoral told his wife to go to the house to get the "thermometer" and to "make sure there was something in it." Mrs. Zavoral said to Mr. Pittman and Mr. Goldsmith words to the effect of "you'll have two seconds when I get back." While she was gone, the Department employees continued to explain to Mr. Zavoral that it was necessary to conduct the inspection for the issuance of Mr. Zavoral's permit and certification.

20. A short time later Mrs. Zavoral came out of the house holding a rifle with a shoulder strap. She made no statements to Mr. Pittman or Mr. Goldsmith and did not point the weapon directly at them. She was approximately 851 away from them at the time. Mr. Pittman and Mr. Goldsmith then immediately got into their car and left the farm.

21. Following this incident, the Department advised Mr. Zavoral's milk plant and other local dairy plants that Mr. Zavoral's permit and certification were suspended. On April 12, 1990, at approximately 11:00 a.m., Mr. Zavoral's milk plant telephoned the Zavoral home and advised them of the Department's actions.

22. The McLeod County Sheriff's Department initiated a criminal investigation of the April 12, 1990, incident. Execution of a search warrant during the investigation revealed the presence of a semi-automatic rifle with a shoulder strap in the Zavoral home.

1/ At the time, Mr. Goldsmith and Mr. Pittman were wearing Department uniforms and driving a Department car. Additionally, both Mr. Goldsmith and Mr. Pittman were known to Mr. Zavoral as Department employees.

23. Both Mr. Pittman and Mr. Goldsmith felt their lives were in danger during the April 12, 1990, incident. Neither of them would return to the Zavoral farm to conduct an inspection under any circumstances.

24. On April 30, 1990, Mr. Zavoral, through his attorney, requested a hearing in regard to the Department's suspension or revocation of Mr. Zavoral's permit.

25. On May 1, 1990, the Department issued and served a Notice and Order for Hearing, setting the hearing in this matter for May 3, 1990. The Notice and Order for Hearing stated that Mr. Zavoral's Grade A permit was suspended by the Department under Section 3 of Part II of the Pasteurized Milk Ordinance due to the permit holder's interference with the Department in the performance of its duties, and that Mr. Zavoral's authority to sell manufacturing grade milk was likewise denied pursuant to the September 1986 agreement signed by Mr. Zavoral.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Agriculture have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and Minn. Stat. Ch. 32 and rules promulgated thereunder.

2. The Notice and Order for Hearing was proper in all respects and the Department has complied with all other substantive and procedural requirements of statute and rule.

3. The Grade A Pasteurized Milk Ordinance, issued by the United States Department of Health and Human Services, Food and Drug Administration, has been adopted by the Department, pursuant to Minn. Stat. 32.394, subd. 4 and Minn. Rule pt. 1530.0720 et seq.

4. Pursuant to Section 3 of Part II of the Grade A Pasteurized Milk Ordinance the Department is authorized to suspend a permit when a permit holder interferes with the Department in the performance of its duties. This section further provides that a suspension of permit shall remain in effect until the violation has been corrected to the satisfaction of the Department.

5. Pursuant to Section 5 of Part II of the Grade A Pasteurized Milk Ordinance dairy farms must be inspected every six months by the Department.

6. The United States Department of Agriculture, Consumer and Marketing Service Recommended Requirements for

Milk for Manufacturing Purposes and its Production and Processing, Vol. 37 Federal Register, No. 68, Part II, April 7, 1972, (manufacturing grade milk requirements) were adopted by the State of Minnesota pursuant to Minn. Stat. 32.415.

7. Under the manufacturing grade milk requirements, dairy farms require annual certification by the Department.

8. Under the manufacturing grade milk requirements, dairy farms must be inspected annually by the Department.

9. Under the terms of the September 1986 agreement signed by Roger Zavoral, interference with Department inspections by Mr. Zavoral constitutes grounds for immediate revocation of his authority to sell either manufacturing grade or Grade A milk.

10. Roger Zavoral unreasonably interfered with the Department's inspection of his dairy farm on April 12, 1990.

11. The Department properly suspended Roger Zavoral's permit to sell Grade A milk and properly denied him the necessary certification to sell his milk as manufacturing grade milk because of his unreasonable interference with the Department's inspection of his dairy farm on April 12, 1990.

12. Because of the serious nature of the April 12, 1990, interference, together with prior interferences, the Department cannot conduct required inspections of Roger Zavoral's dairy farm without an unacceptable risk to Department employees.

13. Because the Department cannot conduct required inspections of Roger Zavoral's dairy farm without an unacceptable risk to Department employees, the continued suspension of his Grade A milk permit and the continued denial of his manufacturing grade milk certification are warranted.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the actions of the Department in this matter be affirmed.

Dated: May 10, 1990

MARLENE SENECHAL
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the Commissioner of Agriculture is required to serve a copy of his final decision upon the parties and the Administrative Law Judge by first class mail.

Reported: Taped, not transcribed

MEMORANDUM

Following the April 12, 1990, incident, the Department suspended Mr. Zavorals Grade A milk permit pursuant to provisions of the Grade A Pasteurized Milk Ordinance. The Department also denied Mr. Zavorals manufacturing grade milk certification pursuant to the terms of the September 1986 agreement signed by Mr. Zavoral. The Department seeks to continue the suspension of the Grade A milk permit and the denial of the manufacturing grade milk certification for Roger Zavoral because it believes that it cannot conduct required inspections of Mr. Zavorals dairy farm without an unacceptable risk to Department employees. The Department recognizes that these are severe actions, since they will effectively put Mr. Zavoral out of business, but argues that there is no alternative in the present case. The Administrative Law Judge agrees with the Department.

Mr. Zavoral argues that his permit and certification should be reinstated by the Commissioner. Mr. Zavoral denies any threats to or assaults against Department employees. He argues that any problems which have arisen are the result of a "personality conflict" with Mr. Pittman. He acknowledges that neither Mr. Goldsmith nor Mr. Pittman want to conduct any further inspections of his dairy farm but he argues that future inspections could be conducted under conditions which would alleviate the concerns of Department employees. These arguments are without merit.

Mr. Zavoral denies all of the threats to and assaults against Department employees which Mr. Pittman and Mr. Goldsmith testified occurred during the period 1984 through 1990. He denies he talked about guns in the manner set out in Finding Nos. 4 and 5. He denies that he assaulted Mr. Goldsmith in the manner set out in Finding Nos. 11 and 12. Both he and Mrs. Zavoral deny that Mrs. Zavoral displayed a rifle on April 12, 1990, as set out in Finding Nos. 19 and 20. The Administrative Law Judge has evaluated the testimony of all witnesses in this matter and has concluded that the only credible evidence compels the findings set out above.

The testimony of Mr. Pittman in regard to the 1984 incident, together with the contemporaneous documentation thereof by the Department, is consistent and credible. The testimony of Mr. Pittman and Mr. Goldsmith regarding the 1986 assault on Mr. Goldsmith, together with contemporaneous documentation by the Department, is also consistent and credible. Furthermore, it is highly unlikely that Mr. Zavoral, with the representation of counsel, would have signed the September 1986 agreement if the events which gave rise to the agreement had not occurred. Indeed, the agreement contains general admissions by Mr. Zavoral regarding the preceding events. In the agreement, Mr. Zavoral acknowledged that the August 20, 1986, suspension of his permit was due to his "physical interference" with Department employees and also due to his "previous actions which have impeded the required inspections". He further agreed that "no further harassment, threatening, or other interference with regularly scheduled inspections" would occur. Therefore, the Administrative Law Judge accepts the evidence presented by the Department and rejects conflicting testimony of Mr. Zavoral in regard to these incidents.

With respect to the April 12, 1990, incident, the testimony of both Mr. and Mrs. Zavoral is rejected as not credible. Mr. Zavoral testified that he asked his wife to go into the house to get a "camera" to take pictures of the Department inspectors. Mrs. Zavoral testified that she was carrying a Kodak 110 camera, rather than a rifle, when she came back outside. It is more than a little unlikely that both Mr. Pittman and Mr. Goldsmith would have mistaken a small camera for a rifle. Furthermore, a semi-automatic rifle was found during a subsequent criminal investigation. Finally, the Zavorals' assertion that they wanted pictures of Mr. Goldsmith to send to their state representative is wholly unbelievable. The alleged reason for the pictures was to show that Mr. Goldsmith had "greasy hair". On the day in question, Mr. Goldsmith was wearing a cap. Mrs. Zavoral was standing 85' away from him with her "camera". Finally, this allegation is inconsistent with their claim that they had no problems with Mr. Goldsmith and that the source of any problem was Mr. Pittman.

Mr. Zavorals claim of a personality conflict with Mr. Pittman is also rejected. He claims to have been "hurt" by a statement made by Mr. Pittman in 1984. Whether or not such a statement was made and whether or not Mr. Zavorals feelings were hurt is irrelevant. Obviously, any such statement is no justification for threats and assaults. Furthermore, Mr. Zavoral made a similar claim, with respect to Mr. Goldsmith, in regard to his problems in 1986. See AG Ex. 5.

Mr. Zavoral suggests that the Department could conduct inspections of his dairy farm under conditions which would alleviate any fears on the part of Department employees. He suggests that the Department could call him before the inspections and he would leave the farm and go to the Sheriff's office. Alternatively, he suggests that Department employees could be accompanied by a law enforcement officer. These suggestions are rejected. The Department has made repeated attempts to work with Mr. Zavoral in the past. The agreement in 1986 was an attempt to keep Mr. Zavoral in business while ensuring the safety of Department employees. Mr. Zavoral breached that agreement in a most egregious manner on April 12, 1990. Department inspections are required by law and are necessary to ensure the integrity of the dairy industry in Minnesota. Department inspections must be unannounced and must be conducted with absolute safety to Department employees. Given Mr. Zavoral's actions, there are no conditions which could be imposed which would ensure this result.

M.E.S.